INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	8
Conclusion	12

CITATIONS

Cases:

Baker v. *Keet-Rountree Dry Goods Co.*, 318 Mo. 969, 2 S.W. 2d 733	9
Benton v. *Maryland*, 395 U.S. 784	11
Cammack v. *Lewis*, 82 U.S. 643	9
Phelps v. *United States*, 252 F. 2d 49	10
Risinger v. *United States*, 236 F. 2d 96	9
Strode v. *Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S.W. 379	9
Warnock v. *Davis*, 104 U.S. 775	9
Williamson v. *United States*, 332 F. 2d 123	10

Statutes:

18 U.S.C. 1341	2
18 U.S.C. 1342	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 478

LOUIS SACHS AND RALPH SACHS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1969. Mr. Justice White extended the time for filing a petition for a writ of certiorari to August 16, 1969, and on August 15, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly refused to give an accomplice instruction.

2. Whether the evidence sustained petitioners' conviction of using a fictitious name to promote a mail fraud.

STATUTE INVOLVED

18 U.S.C. 1342 provides:

> Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted on seven counts of an indictment charging six counts of mail fraud, in violation of 18 U.S.C. 1341, and one count of using fictitious names

for the purpose of promoting such fraud, in violation of 18 U.S.C. 1342. Each petitioner was given concurrent five-year sentences of imprisonment on four of the counts, to be followed by an additional five years of imprisonment on the three remaining counts (1 R. 1-8, 63-64). The court of appeals affirmed.

Petitioners, who are brothers, were the controlling officers and, with their wives, the sole stockholders of certain loan companies[1] operating in St. Louis, Missouri (Tr. 53-54, 608-611, 718), which had either made or purchased the six loans involved in this case. The borrowers, husband and wife, had paid for credit life insurance on the husband for the anticipated term of five of these loans. Some of these policies were for a reducing term, decreasing the principal on a monthly basis according to the scheduled reduction of the loan by regular payments. The others were "level term" policies, on which the full amount of the loan was payable throughout the life of the loan (Tr. 218-219). The borrower on the sixth loan, one Costello, had refused to purchase insurance, and the company did so at its own expense (Tr. 624-626). As to each of these transactions,[2] the salient circumstances of which are detailed below, the loan company both collected the life insurance and induced the widow to make or sign over additional payments.

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[1] Hereinafter referred to as the "loan company," inasmuch as they operated substantially as a single unit.

[2] It appears that a total of eighteen death claims were made from January 1, 1959, to April 1, 1963 (Tr. 828).

1. *Burress loan, counts 1 and 8.* Following Mr. Burress' death, petitioner Louis Sachs instructed his secretary, Mrs. Wells, to write the widow a letter over the signature of "C. Graham, Collection Manager," expressing sympathy and asking when it would be convenient for her to resume payments (Tr. 375-376). Shortly thereafter, he directed Mrs. Wells to make a claim to the insurance company for $750.26, the amount due on the loan. The claim was promptly paid (Tr. 66-67, 111, 377-381). The widow was then sent further dunning letters, over the signatures of "J. Lewis" or "R. Tracy." "J. Lewis" was a name used by the office in making collections, to represent Louis Sachs; "R. Tracy" was used to represent Ralph Sachs (Tr. 77-86, 371-373, 428, 473, 493-496). The widow paid $201.88 before learning that the insurance company had already paid the account in full (Tr. 86-87, 111).

Costello loan, count 2. Unknown to the Costellos, the loan company had purchased a reducing term policy on their debt after Mr. Costello refused to buy one (*supra*, p. 3; Tr. 399, 624-626). Following Costello's death, and pursuant to instructions from Louis Sachs, Mrs. Wells applied to the insurance company for $4,317, which was paid. Louis Sachs then personally demanded of the widow that she execute a new note for $5,280, including accrued interest, which she did. She learned of the insurance company's payment through an accountant only after she had paid the note in full (Tr. 242, 286-292, 322-325, 400-402).

Smith loan, count 3. The level term insurance on this account yielded a check for $817.30 to the loan company and a check for $282.70 payable to the widow (Tr. 233-234). A man at the loan company, identified as Ralph Sachs by one Hunt, an undertaker's employee who had accompanied the widow to the loan company office, told the widow that she could either have the check payable to her or the Smiths' mortgaged automobile, but not both. Faced with this demand, the widow endorsed the check in blank (Tr. 309-310, 333-336).

Downs loan, count 4. Mrs. Downs asked Ralph Sachs if the insurance on the life of her deceased husband would not pay off the loan. Sachs replied that the policy had lapsed and insisted that the widow pay $525 to settle the account. She did so, from the proceeds of other insurance. The company had already received payment in full from the insurance (Tr. 253-257, 393-397).

Lewis loan, count 5. Following Mr. Lewis' death, the manager of a subsidiary loan company in Kennett, Missouri, directed the widow to submit documentary evidence of the death in order to collect on the insurance. The manager then transmitted these papers to the loan company in St. Louis, which forwarded them to the insurance company. The insurance company issued its check for $700 on the level term policy, which was of the "level term" type. The balance due on the Smith loan was $256.75 (Tr. 128-139, 174-176, 227). Louis Sachs directed the manager to credit the latter amount to the Smith account, closing it out. He directed that a check for

the balance be issued payable to the widow, that the manager secure her endorsement on it, and that he treat the item as a recovery on old uncollectible accounts (Tr. 134-135). In carrying out these directions, the manager presented the check to the widow face down. She gave her endorsement, understanding that it was necessary to settle the account (Tr. 191-193).

Arnold loan, count 6. A level term policy was issued to cover this loan of $288. Following the death of the husband, who had made only one payment, the insurance company paid the loan company $300 on the policy. No part of this was paid over to the widow (Tr. 228-229, 406-409, 508-511).[3]

2. The defense brought out that the loan company's bookkeeper, Rouillard, had become disenchanted with his employers and had sought to turn over to the manager of the Kennett branch stock certificates which would have given the latter ownership of that company. Following the manager's rebuff of this offer, Rouillard had contacted several of the widows mentioned above and, on behalf of himself and Mrs. Wells, had negotiated contracts for the bringing of civil suits against the loan company. Rouillard and Mrs. Wells were to share in the proceeds of these suits, either fifty percent of the total recovered or fifty percent of the punitive damages (Tr. 257, 270-276, 294, 441, 458, 467-470). All of these suits had been settled, some after trial, for substantial amounts (Tr. 258-263, 294-295, 355, 357-358, 691).

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[3] Count 7 was dismissed before trial (Tr. 43).

Petitioners stress their own testimony in the trial of this case. Louis Sachs testified that he would have settled none of the civil suits had he known of the arrangement whereby Rouillard and Mrs. Wells shared therein (Tr. 632, 646, 653). He denied in detail the testimony (*supra*, pp. 4, 5) linking him with the recovery of double payment of the Burress and Lewis loans (Tr. 634-642, 647-652, 698-700). He said that following the death of Costello, he told the company's attorney, now deceased, that the insurance company's payment belonged to the loan company, which had paid the premium. The attorney agreed and told him to deposit it to the loan company's funds (Tr. 629, 684, 692). This was his "gamble" with the insurance company (Tr. 685-686). Louis Sachs further testified that "J. Lewis" was a name used in the office because people had started calling him "Mr. Lewis"; that "J." was from Junior. He had not authorized its use in the office (Tr. 705-707). The name Tracy was that of a former employee. To his knowledge, his brother, Ralph Sachs, did not use the name of "R. Tracy" (Tr. 708-710).[4]

Ralph Sachs denied that he had ever signed his name as "R. Tracy" or authorized use of that name on letters addressed to Mrs. Burress (Tr. 730-734). He said that the deceased lawyer had advised that

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[4] An employee in the office testified similarly as to the use of this name (Tr. 545-547, 559). Sachs' daughter, however, testified that "R. Tracy" was essentially the same as Ralph Sachs on collections and that "J. Lewis" was Lou Sachs (Tr. 601-603).

the proceeds of the Costello insurance should go to the company and no credit should be given to the Costello account because "the insurance company may come back and demand the money back" (Tr. 725). He denied the testimony of government witnesses (*supra*, p. 5) that he personally brought pressure on Mrs. Smith and Mrs. Downs to renew payments on their loans after death of their husbands (Tr. 730-734, 767).

The case was submitted to the jury on instructions, to which no exception was taken, that a man is not punishable for mistakes or for errors of judgment (Tr. 835), or for the acts of his employees which he did not knowingly direct (Tr. 853), but only for his own intentional criminal acts (Tr. 851-852). In this connection, the jury were further instructed that if a man honestly and in good faith seeks and follows the advice of an attorney, intending that his acts be lawful, he lacks criminal intent, even though the advice given should be inaccurate (Tr. 844, 852). Instructions in customary form were also given as to the presumption of innocence, the burden resting upon the government to prove guilt beyond a reasonable doubt, and the credibility of witnesses (Tr. 833-835, 855-856). The jury returned a verdict of guilty on all counts against both petitioners (Tr. 859-860).

ARGUMENT

Petitioners present no considerations warranting a grant of certiorari. Although they disclaim any intention to question the sufficiency of the evidence,

the whole of their brief is devoted to an attempt to present the case as that of two reputable businessmen victimized by unscrupulous employees. This view, fully argued to and rejected by both the jury and the courts below, does not reflect the government's case, which was ample to support their conviction.[5] Without it, the insubstantiality of the petition plainly appears.

1. An accomplice instruction[6] presupposes that

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[5] Mrs. Wells' testimony that Louis Sachs directed the double collection of the debt from both the borrower and the insurance company was corroborated by the testimony of the manager of the Kennett branch office in the particular case of the Lewis loan. The personal participation of Ralph Sachs was testified to by Ralph Hunt, the employee of the undertaking establishment who accompanied Mrs. Smith to the loan office, and by Mrs. Downs who was told by this petitioner that the policy on her deceased husband's life had lapsed. The cooperation of the two brothers in the direction of the company's affairs, which alone received the benefit of such double charges, supported an inference of mutual responsibility of each for the other's acts. The disputed factual contentions, which petitioners still argue to the Court, were resolved on proper instructions by the jury. The impropriety of the double collection of the Costello debt, contested by petitioners, is established both by Missouri law and the law generally. *Baker* v. *Keet-Rountree Dry Goods Co.*, 318 Mo. 969, 2 S.W. 2d 733; *Strode* v. *Meyer Bros. Drug Co.*, 101 Mo. App. 627, 74 S.W. 379; and see *Warnock* v. *Davis*, 104 U.S. 775; *Cammack* v. *Lewis*, 82 U.S. 643.

[6] Petitioners submitted the following instruction (Pet. App. 16):

> An accomplice is one who voluntarily participates in the commission of the crime. You are instructed that the testimony of an accomplice should be closely examined and weighed with caution and great care.

As the court below noted, it is highly questionable whether an instruction in this form correctly states the law. Compare *Risinger* v. *United States*, 236 F.2d 96, 99 (C.A. 5).

the person concerned may have been in league with the defendant in his criminal scheme. Neither the government's case nor petitioners' is consistent with that view of the facts. The government's submission was that Mrs. Wells was an unwilling employee, who did what she was told but took no profit from the criminal scheme. Petitioners' argument, fully aired to the jury, was that they were innocent of wrongdoing, and had been "framed" by their employee who in fact was wholly responsible for any fraud. Neither theory supports the giving of the instruction. In any event, as the court below found (Pet. App. 19a), refusal to give the instruction even where appropriate does not necessarily constitute reversible error. This is not a case like *Phelps* v. *United States*, 252 F. 2d 49 (C.A. 5), where the judge affirmatively told the jury to disregard any possibility that an alleged accomplice was criminally implicated, or *Williamson* v. *United States*, 332 F. 2d 123 (C.A. 5), where the court of appeals appears to have reached the conclusion that the alleged accomplice should have been disbelieved. Both those opinions, petitioners' sole reliance for his claim of conflict, were expressly grounded "in the circumstances" of those particular cases. 252 F. 2d at 53, 332 F. 2d at 131 n. 9. Since similar circumstances are lacking here, and on the authority cited by the court below, it is clear that there is neither conflict among the circuits nor any other matter of importance warranting certiorari on this issue.[7]

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[7] Petitioners' claim that the harmless error rule was misused in this case is without support in the decision below. In

2. The evidence fully supported petitioners' conviction, under count 8, of using fictitious names to promote the fraudulent scheme. Aside from any question of the sentence on this count being concurrent with the sentences on counts 1, 3, and 5 (see *Benton* v. *Maryland*, 395 U.S. 784), the evidence showed that "J. Lewis" and "R. Tracy" were fictitious names petitioners used "for the purpose of conducting, promoting, or carrying on" through the mails the scheme as it applied to Mrs. Burress (*supra*, p. 4). Moreover, as the court of appeals pointed out (Pet. App. 22), the use of assumed names in itself contributed materially to the fraudulent scheme by making more difficult the pinpointing of responsibility for originating and executing the scheme.

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reaching its decision, the court relied upon a count as to which Mrs. Wells' testimony was not implicated, Pet. App. 17a-18a; nor did it apply a "harmless error" rule as such. It determined only that in the circumstances of this case an accomplice instruction was not required.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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